82-1328

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

EDMOND PFOTZER AND E. JOHN PFOTZER,
CO-PARTNERS Petitioners

VS

UNITED STATES
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EDMOND PFOTZER
E. JOHN PFOTZER
Petitioners pro se

Address:
P. O. Box 987
Wilmington, Delaware 19801
Tel: (302) 764 5010

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IN THE UNITED STATES COURT OF CLAIMS

NO. 274-72

EDMOND PFOTZER & E. JOHN PFOTZER	: Government contract; Wunderlich Act review; alleged violation of procedural due process hearing rights; Contract Appeals Board refusal to grant extension; non-appearance of plaintiffs and submission of case on the written record
v.	
THE UNITED STATES	

Edmond Pfotzer and E. John Pfotzer, pro se

Ray Goddard, with whom was Assistant Attorney General Alice Daniel, for defendant.

Before FRIEDMAN, Chief Judge, DAVIS and KUNZIG, Judges.

ORDER

This is a government contract action in which the plaintiffs appear pro se on the parties' cross-motions for summary

judgment. Plaintiff contractors take the position that they were deprived of procedural due process when the Corps of Engineers Board of Contract Appeals (the Board) refused to grant an extension of their hearing date, and that this resulted in a failure to comply with the Wunderlich Act, 41 U.S.C. §§ 321, 322. Defendant answers that the administrative decision is legally and factually correct, is supported by substantial evidence, and should be upheld by this court. For the reasons set forth below, we hold for defendant because we find, without need for oral argument, that there has been no violation of plaintiffs' due process rights, and that the Board's decision is in full compliance with Wunderlich Act standards.

Edmond Pfotzer and E. John Pfotzer

are partners in a business which in 1949 was awarded a contract to construct some additional filters at the filtration plant of the Washington Aqueduct in and near the District of Columbia. After completion of the work, which was delayed past the construction completion date, plaintiffs filed numerous claims with the Contract Appeals Board, relating inter alia to delays, liquidated damages and work quality. Some of these claims were the subject of the petition in the present case filed by plaintiffs in this court in 1972. As a result of discovery initiated by plaintiffs in the Court of Claims action, they were granted a stay of proceedings in this court and thereupon petitioned the Board for a rehearing of its decisions based on alleged newly discovered evidence. This motion was

granted by the Board, and plaintiffs filed twelve amended complaints with the Board by April 4, 1978. In response to several requests by plaintiffs that defendant file answers to the complaints, the Board informed the parties on June 22, 1978, that unless answers were received within 30 days, the Board would enter a general denial on the Government's behalf, as provided for in Rule 6(b) of the Board's Rules. By letter of July 14, 1978 to the Board, the Government acquiesced in the issuance of a general denial, and so informed plaintiffs. In addition to this general denial, in October 1978, the defendant filed motions to dismiss the complaints, and by order of the Board on November 9, 1978, the motions were considered as part of defendant's answers.

This order also required defendant to file more extensive answers within seven days of receipt of the order. These supplemental answers were filed on November 14, although plaintiffs allege that they did not receive them until November 27.

During August 1978, the rehearing, which had been originally scheduled at an earlier date and postponed several times pursuant to requests of both parties, was finally set for December 5, 1978. Plaintiffs objected to this date as allowing them insufficient time to evaluate the Government's motions and answers, and to prepare for the hearing, but they were unsuccessful in obtaining the three-month extension they sought. In addition to repeatedly denying plaintiffs' extension request, the Board specifically informed

plaintiffs on November 29, 1978, that

> (t)he unexcused absence of a party at the prehearing conference or at the hearing on 5 December 1978 will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided by Rule 11.

Notwithstanding this order, plaintiffs informed the Board that they would not appear at the December 5 hearing, that they did not waive a hearing, and that they urged the Board to reconsider its denial of an extention--a denial which plaintiffs contended was a deprivation of their procedural due process rights. Plaintiffs did not appear at the hearing, and on December 11, 1978, the Board wrote plaintiffs informing them that the hearing had been held, as scheduled, that their absence had been ruled to be unexcused, and that the

case had been treated as being submitted for decision on the record, without an oral hearing for plaintiffs.

After evaluating the evidence before it, including the newly discovered evidence, the Board issued its opinion in August 1979. In it the Board denied most of plaintiffs' claims, but granted at least partial relief to plaintiffs on two of their claims.[1]

In October 1979, the Board denied plaintiffs' motion for reconsideration of its August opinion.

Plaintiffs' current motion for judgment in this court is based on the sole ground that the administrative decision should be overturned because the Board's actions with respect to the procedural as-

1/ Defendant does not challenge these allowed claims.

pects of the hearing violated their rights of due process under the Fifth and Fourteenth[2] Amendments (as well as the Board's rules, and the Disputes clause). This deprivation purportedly resulted, at least primarily, from the Board's refusal to grant plaintiffs a three-month extension of their hearing date. This action, according to plaintiffs, was sufficient to deprive them of their constitutional right to a full-scale hearing and to render the Board's decision invalid as being "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith * * *." 41 U.S.C. § 321. Plaintiffs also argue that the Board's determination fails to meet the Wunderlich Act requirement that it be sup-

2/ Defendant's reliance on the Fourteenth Amendment is obviously misplaced since there is no state involvement in this action.

ported by substantial evidence. Id.

We conclude, on full consideration, that the record provides no support for plaintiffs' contention that they were denied procedural due process. While the exact requirements of due process may vary according to the particular circumstances of a case,

> "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." * * * "The fundamental requisite of due process of law is the opportunity to be heard," * * * a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." (Goss v. Lopez, 419 U.S. 565, 579 (1975) (citations omitted) (emphasis added).)

Accord, Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971). This standard is ap-

propriate to measure the due process challenge plaintiffs now make.

There is no doubt that these requirements of notice and an opportunity to be heard were fully granted to plaintiffs in this instance. As early as August 1978, plaintiffs were informed by the Board that the rehearing would be held on December 5, 1978. In addition to this period of time between notice and hearing, plaintiffs had a five-year period between the 1973 suspension of proceedings in this court and the December 1978 Board hearing involved here in which to prepare their case.

Plaintiffs contend, however, that there was not sufficient time for them to prepare their case by the scheduled hearing date in light of the failure to receive defendant's answers to their com-

plaints until November 27, 1978, a week before the hearing, and the fact that they had received defendant's motions to dismiss only in October of that year. While it is true that pursuant to the Board's November 9, 1978 request for more detailed answers defendant filed supplemental answers with the Board on November 14 (which plaintiffs allege they did not receive until November 27), plaintiffs were informed as early as July 1978 that defendant had acquiesced in the Board's entrance of a general denial on defendant's behalf.[3] Thus,

3/ This general denial was made in compliance with Rule 6(b) of the Board's Rules which allows the Board to enter such a response if the Government has not filed its answers within 30 days after receipt of the complaint, as was the case here. The Board was not, as plaintiffs urge, required to do so within 30 days of defendant's receiving the complaint; rather, it had the discretion to do so after 30 days had elapsed.

plaintiffs were aware of the Government's overall position long before the hearing date. They also had over a month between the time they received the Government's motions to dismiss and the date of the hearing. In addition, as the Board correctly stated, "(a)ppellant had the burden of proof and should not--in this case--have expected Answers which relieved it of any substantial part of its obligation to support its Amended Complaints with evidence." Board Decision of August 16, 1979, at 5. There is also support for the reasonableness of denying further extensions in the fact that the claims at issue arose from a contract which was performed by 1950, and these and similar claims had been litigated by the parties in various forums throughout the period between 1950

and 1978.[4] Based on these specific facts

4/ In its decision of October 26, 1979, denying reconsideration of its prior holding of August 16, 1979, the Board pointed out:

> We concluded that the Appellant had stated its claims in 1949-1950, had restated them in its pleadings in the period 1950-1965, that it had added more detail in its memoranda filed in 1977, that it had re-pled (sic) its cases in the spring of 1978. Further the Respondent had stated its position in the contracting officer final decisions, and in its original pleadings. In addition the Appellant had obtained extensive discoery of the Government's files and only remaining witness several times since 1973. In the summer of 1978 the Board and the Government indicated that general denials would be entered in these appeals and in the June-August 1978 period the cases were scheduled for trial on 5 December 1978. Thus we find it hard to believe that after 30 years of correspondence, decisions, pleadings, and discovery the Appellant was not ready for the 5 December 1978 proceedings because it had only received the latest Government answers on November 27, 1978.

and the long history of the case, we cannot say that it was a violation of procedural due process for the Board to refuse to grant yet another postponement of the hearing date.[5]

Nor may plaintiffs draw a constitutional violation from their deliberate refusal to attend the hearing. Due process requires the opportunity for a hearing, Goss, supra, 419 U.S. at 579, not a right to ignore a properly scheduled hearing date and then to attack the decision of the administrative body on the ground that there was no hearing. Plaintiffs elected not to attend and cannot now say that they were denied an opportunity to do so. They

5/ The evidence in the record provides no support for plaintiffs' contention that the court discriminated against them in the granting of postponements and continuances.

plainly could have appeared and presented their affirmative case which caused them to seek rehearing. Furthermore, plaintiffs were warned by the Board that, if they did not appear, their nonappearance would be deemed an unexcused delay and they would be considered to have waived their right to a hearing.[6]

6/ Plaintiffs assert that the Board's actions impaired not only their opportunity to be heard, but also other elements of a constitutionally adequate hearing such as an unbiased tribunal and avoidance of ex parte communications which plaintiffs interpret as prohibiting hearings at which only one side appears. Plaintiffs do not support these allegations with any facts or analysis, and we find them to be without merit. With respect to the so-called ex parte hearing, the only reason it was "ex parte" is because of plaintiffs' unexcused absence. Nor do we find, as plaintiffs contend, that the Board was partial to defendant because it ruled against plaintiffs on the extension issue. Our examination of the record has uncovered no evidence of partiality to either side.

16a There is likewise no support for plaintiffs' contention that the Board violated its own rules in refusing to grant the requested three-month delay. On the contrary, the Board properly interpreted and applied its rules. Rule 11 provides that while both parties are entitled to a hearing, either may waive a hearing and submit its case upon the record. Under Rule 19,

> (t)he unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

Nothing could be clearer than that these rules applied to the plaintiffs' situation and permitted the Board to waive the hearing and submit plaintiffs' case on the record. Not only is this language straight-

forward and its meaning plain, but the Board informed plaintiff of its meaning before the hearing took place.

Plaintiffs also urge that the Preface of the Rules, Rule 17, and Rule 18 were violated by the Board's refusal to advance the hearing date. These provisions, which deal with such matters as the scheduling of hearings, give the Board discretion to extend time limits and to give "due regard to the desires of the parties, and to the requirement for just and inexpensive determination of appeals without unnecessary delay." The rules thus require a balancing of the competing interests of good cause for time extensions versus the avoidance of unnecessary delays. Taking into consideration the circumstances of the instant request, discussed supra, we find that the

Board was acting within its discretion when it decided that an additional postponement of the hearings was not necessary or desirable.[7]

Similarly for the argument that the Board's actions violated the Disputes Clause (Article 15). That provision required, as usual, that factual disputes be resolved by the contracting officer whose decision would be appealable to the head of the Corps of Engineers or his representative. Plaintiffs read a good faith standard into this Article and assert that

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7/ Plaintiffs cite two other provisions which they believe were violated: Rule 5 (dismissal for lack of jurisdiction) and Preface Paragraph (a) (requiring the full consideration of appeals). Since the Board clearly had jurisdiction over these claims, and there is no evidence that the Board did not fully and carefully consider plaintiffs' appeals, these rules were fully complied with.

it was violated by the Board's allegedly arbitrary and erroneous refusal to grant the extension request. But as we have already pointed out supra, there was no deprivation of procedural due process, the Board followed its own procedural rules, and did not abuse its discretion. The Disputes Clause gave plaintiffs no greater procedural rights which the Board could have breached.

Finally, we come to plaintiffs' argument that the Board's decision lacks finality because it is not supported by substantial evidence. 41 U.S.C. Section 321. The sole basis for this position is that, because the Board acted improperly in refusing to reschedule the hearing, none of the evidence upon which the Board based its decision should properly have been con-

sidered and therefore the decision was unsupported by any evidence. This argument must, of course, fail because we have already held that the Board did act constitutionally, and within its powers and discretion. There can be no doubt that the Board could rely on the evidence in the written record and the evidence which defendant presented at the December 5 hearing. As plaintiffs point to no other basis for their argument grounded on lack of substantial evidence, defendant has no responsibility to prove that the Board's decision was based on sufficient evidence, and the court need not search the record to make an independent determination on that issue. See, LSi Service Corp. v. United States, 191 Ct. Cl. 185, 188, 422 F.2d 1334, 1335-36 (1970).

For these reasons, defendant's motion for summary judgment is granted, and plaintiff's motion is denied. The petition is dismissed.

IT IS SO ORDERED.

FEB 6 - 1981

BY THE COURT

/s/ Daniel M. Friedman

Daniel M. Friedman
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

NO. 274-72

EDMOND PFOTZER AND
E. JOHN PFOTZER

V.

THE UNITED STATES

Before FRIEDMAN, Chief Judge,
DAVIS and KUNZIG, Judges.

ORDER

PER CURIAM: This case comes before the court on plaintiffs' motion, filed April 17, 1981, for rehearing pursuant to Rule 151 (b), with reference to the order entered herein on February 6, 1981, dismissing the petition. Upon consideration thereof, without oral argument,

IT IS ORDERED that plaintiffs' said motion for rehearing is denied.

MAY 15 1981

IN THE UNITED STATES COURT OF CLAIMS

NO. 274-72

EDMOND PFOTZER AND E. JOHN PFOTZER	:	Rehearing under Rule 152(b); "reasonable time."
V.	:	
THE UNITED STATES	:	JUL 16 1982

Edmond Pfotzer and E. John Pfotzer, pro se.

Lenore C. Garon, with whom was Assistant Attorney General J. Paul McGrath, for defendant.

Before FRIEDMAN, Chief Judge, and DAVIS, Judge.

ORDER

PER CURIAM: In this contract case, the court denied plaintiffs' motion for summary judgment, granted defendant's motion, and dismissed the petition. Order of February 6, 1981. Rehearing was denied by Order of May 15, 1981. The present motion (filed May 10, 1982) is for relief under Rule 152(b). The ground is that our order of February 6, 1981 (confirmed by the denial of rehearing on May 15, 1981) pro-

perly dismissed not only the Wunderlich Act claims heard and decided by the Board of Contract Appeals, but also independent "breach" claims, said to be stated in the petition, over which that Board had no jurisdiction, and which should be tried in this court.

We assume, without deciding, that the petition embodies such "breach" claims separate and apart from the Wunderlich Act claims, but nevertheless we deny the current motion under Rule 152. The conditions of that Rule have not been satisfied. Plaintiffs invoke three parts of the Rule, i.e., (b)(1), (b)(4), and (b)(6). Subsection (b)(1)--"mistake, inadvertence, surprise, or excusable neglect"--is inapplicable because it requires that the motion be made not more than a year after

the order complained of, and here the dispositive order was entered on February 6, 1981, while the current motion was not filed until May 10, 1982, considerably more than a year later.

Subsection (b)(4) deals with a "void" judgment and requires that a motion under Rule 152 "shall be made within a reasonable time." In this case the order and judgment of February 6, 1981, was not "void" even if it was mistaken. The Court of Claims plainly has jurisdiction over "breach of contract" claims and an erroneous dismissal of the "breach" claims would not be "void" for lack of jurisdiction.

Subsection (b)(6) concerns "any other reason justifying relief from the operation of the judgment," and, again, must be made "within a reasonable time." Even if

this general provision is available to them, plaintiffs have not sought relief within a reasonable time. When the court considered the cross-motions for summary judgment, plaintiffs did not call the court's attention to any separate "breach" claims, nor did they, after the issuance of the order of February 6, 1981, call the court's attention, in any proper fashion, to their contention that separate "breach" claims had been incorrectly dismissed. Their own papers on the instant motion show that they soon understood that the entire petition (including any "breach" claims) had been dismissed by the order of February 6, 1981. But their first motion for rehearing (filed after they had become so aware) did not alert the court to that aspect of the case or

ask for its rectification. And, after rehearing was denied on May 15, 1981, plaintiffs were formally and expressly informed by the Clerk in a letter of September 24, 1981, that the entire petition had been dismissed. But the instant motion was not made until May 10, 1982, some seven months later. Plaintiffs have not acted within reasonable time, as the Rule demands. *

Plaintiffs motion under Rule 152(b) is denied.

JUL 16 1982

*/ For the same reasons, their motion under Rule 152(b)(4) was not filed within a reasonable time.

IN THE UNITED STATES COURT OF CLAIMS

September 10, 1982

ORDER

PER CURIAM: IT IS ORDERED that the

motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151 and 152 are DENIED:

App. 18-80 Jerald H. Miller
Petitioner's motion for reconsideration filed August 31, 1982 of order dated July 16, 1982. (FRIEDMAN, Chief Judge, NICHOLS and KASHIWA, Judges

274-72 Edmond Pfotzer and E. John Pfotzer
Plaintiffs' corrected reply memorandum received August 27, 1982, treated as plaintiffs' motion for rehearing of order dated July 16, 1982. (FRIEDMAN, Chief Judge and DAVIS, Judge)

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON,D.C. 20314

DAEN-CCB 26 June 1978
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. E. J. Pfotzer
P. O. Box 987
Wilmington, Delaware 19899

Re: Appeals of E. & E. J. Pfotzer
Docket Nos. Eng C&A 500, BCA 2581, 2587, 2618 & 2678

NOTICE OF HEARING

Dear Mr. Pfotzer:

You are advised that a full-scale hearing in connection with the above-captioned appeals has been scheduled to commence at 10:00 AM, Tuesday, 19 September 1978 in the Forrestal Building, 1000 Independence Avenue, Washington, D. C.

You will be notified at a later date as to the exact location and room number of the hearing.

In the event of unexcused absence of either party or counsel, the appeal will be considered as having been submitted on the part of the absent party.

The Board requires both parties to exchange copies of any reproducible exhibit which is to be introduced into evidence at the hearing. It is preferred that this exchange take place prior to the hearing but if not, it is to be accomplished in such a way that the progress of the hearing is not impeded. Every reasonable effort is to be made to assure that Appel-

lant and the Government are provided with a duplicate of the exhibits furnished the Board. Unless good cause is shown the Board will look with disfavor on any request to withdraw exhibits for copying after the record is closed.

Sincerely yours,

/s/ Frances H. Aceto
FRANCES H. ACETO
Recorder, Corps of Engineers
Board of Contract Appeals

Copies furnished:
Howard A. Pollack, Esq.,
Baltimore District
DE North Atlantic Division
Gary W. Hudiburgh, Esq.,
DAEN-CCF OCE

Hon. George S. Steele, Jr. : Re: Appeals
Administrative Judge : of E. & E.J.
Department of the Army : Pfotzer,
Office of the Chief of : Appellants,
Engineers : Contract No.
Washington, D. C. 20314 : DA-49-080-Eng.-27, Dalecarlia Filters, Docket No. C&A 500 Etc.

(and U.S. Court of Claims Action No. 2618)

November 8, 1978

(1) APPELLANT'S MOTION FOR POSTPONEMENT OF PRESENT HEARING DATE AND (2) FOR ADDITIONAL TIME TO RESPOND TO RESPONDENT'S MOTION TO DISMISS AND/OR STRIKE TWELVE SEPARATE CLAIMS

(1) Appellants find it necessary to request postponement of the present hearing date, for the herein subject claims, as before the Board, from December 5, 1978 to March 1,1979.

(2) Also, appellants request fifty additional days time, beyond the present twenty day time limit, such as required to respond to respondents motion as filed simultaneously with the Board, under date of October 26, 1978, to cover dismissal and/or striking of twelve of appellants individual claims.

(3) Appellants will file their brief with the Board in support of the herein motion, on or before November 1, 1978.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

CC: Howard A. Pollack, Esq.
Acting District Counsel

Timothy A. Sullivan, Esq.
Engineer Trial Attorney

E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr. Administrative Judge Department of the Army Office of the Chief of Engineers Washington, D. C. 20314	Re: Appeals of E. & E. J. Pfotzer, Appellants Contract No. DA-49-080-Eng -27, Dalecar- lia Filters, Docket No. C&A 500 Etc. (and U.S. Court of Claims Action No. 2618). November 10, 1978

BRIEF IN SUPPORT OF APPELLANTS MOTION DATED NOVEMBER 8, 1978 FOR POSTPONEMENT OF HEARING DATE; AND FOR ADDITIONAL TIME

TO RESPOND TO RESPONDENT'S MOTIONS TO DISMISS AND/OR STRIKE TWELVE APPEALS.

STATEMENT

Appellant has for a long time past, beginning with June 20, 1978 urged respondent to file its written answers to appellants amended complaints, and concurrently stressed that its failure to do so threatened to ultimately delay appellants preparation for the hearing; however, all such efforts have been ignored. REspondents indirect position as indicated appears to be that it may make an oral answer to appellants eleven written amended complaints on the first day of the hearing.

In this matter, above all, appellants seek to "secure a just and inexpensive determination of appeals without unnecessary delay." However, it is evident, that

such cannot be attained without respondents answers having been timely filed with the Board. A verbal answer to each of the claims at the beginning of the hearings is clearly inadequate insofar as complying with formal requirements of an answer in a pleadings procedure.

It is further submitted that beside a pre-hearing conference as presently outlined requiring substantial time for proper preparation by appellant in order to satisfy the most comprehensive agenda; there has also been placed before appellant, at this late date, the formidable task of adequately responding to respondents motions to dismiss and/or strike, twelve of appellants appeals, such motions all filed in one day, October 26, 1978, with the Board, such rather than being

filed singly in normal order as completed. Under these most difficult circumstances for appellant, respondent has informed the Board it is ready to proceed with a hearing.

Appellant respectfully submits that a just determination of the claims cannot be made under such conditions. It is at once manifest that respondents timely written answers to appellants eleven amended complaints, in fairness to appellant and the Board, should be filed with the Board, in order for it to determine the real and/or proper issues. Failing in the latter the Board's judgment, as well as appellant's cause may suffer. REspondent cannot properly be considered ready for a hearing, as it states, in that it has not to this date filed its answer to a single complaint, as before the Board. Nor has it

filed its motions to dismiss and/or strike twelve of appellants claims in reasonable or timely procedural sequence, so as to thereby allow appellant sufficient time to respond.

ARGUMENT

N.B. Next 10 pages have for brevity been omitted.

CONCLUSION

It is submitted, upon the basis of the record and pertinent facts, as hereinabove set forth, that the postponement of the hearing date; and enlargement of time for filing appellant's responses to defendant's motions to dismiss and/or strike, should be allowed as a matter of elemental fairness.

Respectfully submitted,

E. & F. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr.
Administrative Judge
Department of the Army
Office of the Chief of Engineers
Washington, D. C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants,
:Contract No.
:DA-49-080-Eng.
-27, Dalecarlia
Filters, Dock-
et No. C&A 500
Etc.
(and U.S. Court of Claims Action No. 2618)

November 14,
1978

SUPPLEMENTARY BRIEF IN SUPPORT OF APPELLANT'S MOTION DATED NOVEMBER 8, 1978, FOR POSTPONEMENT OF HEARING DATE; AND FOR ADDITIONAL TIME TO RESPOND TO RESPONDENT'S MOTIONS TO DISMISS AND/OR STRIKE TWELVE OF APPELLANT'S APPEALS.

Appellant refers herein to respon-

dent's letter, dated November 9, 1978, to the Board relating to appellant's request for a continuance of the hearing scheduled date from December 5, 1978 to March 1, 1979.

Incidentally, appellants request a correction be made in its brief, dated November 10, 1978, filed with the Board, bearing upon the present matter. In this connection, reference is made to the last line on page two thereof. Please correct phrase therein, which should read: "and it is upon such premise", the word is was omitted.

STATEMENT OF FACTS, INCLUDING RELATED ARGUMENT

(1) It is again noted, that the hearing date of December 5, 1978, was selected by respondent to suit, as stated for its con-

venience, and to which appellant made no objection.

(2) Respondent has stated in its herein subject letter that "Appellant has offered no reason, justifiable or otherwise, for the postponement." Further, respondent has added, "Such request for postponement, in light of all these circumstances, appears unconscionable and unwarranted. Also, it is noted, respondent has stated: "Such request is highly unreasonable."

(4) The foregoing statements were made by respondent, having substantially, with respect to pertinent facts as then of record, the same knowledge as possessed by appellant; and which knowledge, should in appellants opinion, not have made it possible for respondent to make such broad misstatements, all of which are contrary

to the real facts.

(5) In support of the foregoing statement appellant refers to its memorandum, as before the Board, dated November 1, 1978: "Re: Notice of Pre-Hearing Conference" wherein four reasons are set forth in support of the therein request for a continuance of the subject conference.

(6) Pursuantly, appellant further refers to its motion, dated November 8, 1978, as before the Board, for a continuance of the hearing date from December 5, 1978 to March 1, 1979; and for fifty additional days time to respond to respondents motion to dismiss and/or strike twelve of appellants claims as before the Board.

(7) It is relatedly submitted that respondents fore-mentioned motions to dismiss and/or strike as in keeping with applicable

Federal Rules should properly have been filed with the Board in the early stages of the proceedings or within a reasonable time after the filing of appellants amended complaints, and not at a time shortly before the shceduled hearing date.

N.B. The next four pages have been omitted.

CONCLUSION

For the added reasons, as noted above, appellant submits its motion, as before the Board, dated November 8, 1978, should be allowed.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON,D.C. 20314

Before the Corps of Engineers Board of Contract Appeals

Appeals of	:
	: C&A NO.500,
E. & E. J. Pfotzer	: Eng BCA
	: NOS. 2581,
Contract No. DA-49-080-ENG-27	: 2587, 2618
	: & 2678

ORDER ON MOTIONS

The Board has carefully considered Appellant's Motions to (1) postpone the hearing from 5 December 1978 to 1 March 1979 and (2) for fifty more days to respond to Respondent's Motions to Dismiss filed 26 October 1978, and Appellant's arguments in support thereof dated 10 November 1978.

We do not find any prejudice to Appellant in conducting a pre-hearing conference on 5 December 1978 and immediately thereafter conducting the hearing in furtherance of the Board's 28 February 1975 Order. Appellant will in our view have had sufficient opportunity by 5 December 1978 to get ready for the pre-hearing and the hearing.

Appellant's motions are denied.

Date: 15 November 1978

/s/ George S. Steele, Jr.
GEORGE S. STEELE, JR.
Administrative Judge

I concur:

/s/ John P. Jellico
JOHN P. JELLICO
Administrative Judge
Chairman

I concur:

/s/ E. K. McFadden
E. K. McFADDEN
Administrative Judge

Hon. George S. Steele, Jr
Administrative Judge
Department of the Army
Office of the Chief of
Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer
:Appellants
:Contract No.
:DA-49-080-Eng.-
27, Dalecarlia
Filters, Docket
No. C&A 500 Etc.
(and U.S. Court of Claims,
Action No. 2618)

November 18,1978

RENEWAL OF APPELLANT'S MOTION, DATED NOVEMBER 8, 1978, FOR ENLARGEMENT OF TIME TO RESPOND TO RESPONDENT'S MOTIONS TO DISMISS AND/OR STRIKE

(1) Appellant herein refers to the Board's order, dated November 9, 1978, received by appellants on November 16, 1978, at 4:00 p.m., and particularly to the reference therein on page two, second paragraph, and which reads, quote "The Board will rule on Respondent's Motions to Dismiss on or after 21 November 1978 thus Appellant, as notified by letters dated 26 October 1978, should file any brief so

that it reaches the Board before 21 November 1978."

(2) Appellants received the Board's above referenced letter, dated October 26, 1978, on October 31, 1978.

(3) Under date of November 8, 1978, appellant by motion, filed with the Board, requested that the Board enlarge the twenty day return time for appellant to respond to respondents motion by fifty additional days. Appellant has received no response to its motion from the Board, nor from respondents to the present date, nor to its brief in support of motion dated November 10, 1978, nor to its supplementary brief in support of motion, dated November 14, 1978. Appellant's above noted correspondence, is hereby made a part of this communication by ref-

erence to the same effect as though herein set forth in its entirety.

(4) Pertinently, it is noted that respondent's motion to dismiss involves twelve claims, all filed upon the same day. Respondents subject motions are involved and complex in their substance; and as such, require time consuming review of the extensive record, and careful research of related law.

(5) In paragraph seven of appellant's supplementary brief, dated November 14, 1978, in support of its motion, appellant stated that respondents motion should properly have been filed with the Board in keeping with provisions of Federal Rules, in the early stages of the proceedings, or within a reasonable time after filing of appellants amended com-

plaints, and not at a time shortly before the scheduled hearing date.

(6) In its supporting brief of November 10, 1978, appellant on page two stated, with respect to its motion "There has also been placed before the appellant, at this late date, the formidable task of adequately responding to respondents motions to dismiss and/or strike, twelve of appellants appeals, such motions all filed in one day, October 26, 1978, with the Board, such rather than being filed singly in normal order as completed.

(7) In further reference to appellant's position in the subject matter it is submitted that the Board rules reasonably contemplate 20 days time in which to respond to a single claim, and not 20 days in which to respond to motions for twelve

claims, as suddenly filed in a single day, en masse. In support of the foregoing appellant refers to Preface to Board rules, paragraph (c):

> (c) Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay.

and also to paragraph (d):

> (d) Preliminary procedures are available x x x to discourage unwarranted surprise.

and similarly to paragraph (e):

> (e) All time limitations for procedural actions x x x. These time limitations are similarly eligible for extension in appropriate circumstances, on good cause shown.

N.B. Remainder of content is omitted

to the conclusion.

(14) In conclusion, appellant requests the Board's consideration of the hereinabove subject matter; and further appellant renews its prior motion dated November 8, 1978, for enlargement of time, in which to respond to respondent's subject motions, by 50 days, to be added to the originally stated 20 days, such period of time to begin with the date of respondent's compliance with provisions of pertinent rules as set forth hereinabove.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr
Administrative Judge
Department of the Army
Office of the Chief of
Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants
:Contract No.
:DA-49-080-Eng-
:27. Dalecarlia
Filters, Docket
No. C&A 500 Etc.
(and U.S. Court of Claims
Action No. 2618).
November 22, 1978

MOTION TO STAY AND/OR HOLD IN SUSPENSE APPELLANT'S MOTION OF NOVEMBER 18, 1978 FOR ENLARGEMENT OF TIME, ETC., UNTIL SUCH TIME AS RESPONDENT REINSTATES ITS THEREIN REFERENCED MOTION

Appellant refers to telephone advice received from respondent, Lawrence E. Leykam, Esq., Division Chief Trial Attorney, at 4:00 p.m., November 14, 1978, informing appellant of respondents withdrawal of its Motions to Dismiss twelve of appellants claims, except two elements thereof as settled.

The latter as similarly referred to in portions of first and second paragraphs

of letter dated November 17, 1978 addressed to the Board, and received by appellant, from respondent, Timothy A. Sullivan, Trial Attorney.

Respondent therein stated in part "x x x the Government hereby withdraws its Motion to Dismiss in CA 500 and ENG. BCA 2678 without prejudice to future reinstatement with the exception of those elements of the motion which address claims "H" and "I".

Respondent in its letter, therein continued as follows: "The withdrawal of these motions will eliminate the need for the appellant to prepare response to the major portion of the motion. Those portions of the motion not withdrawn were made the basis of an accord and satisfaction and involve no litigable issue as

those claims were settled in 1954."

In accord with the above, appellant submits its herein captioned motion, and as such superseding its motion of November 18, 1978; and further requests that such motion, of November 18, 1978, be stayed and/or held in suspense until such time as respondent reinstates its subject motion.

In consideration of these representations, appellant requests the Board grant its herein stated motion.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314

Before the Corps of Engineers Board of Contract Appeals

Appeals of : C&A No. 500,
: ENG BCA 2581,
E. & E. J. PFOTZER : 2587, 2618 & 2678

Contract No. DA-49-080-ENG-27

ORDER

The Board allows Respondent's 17 November 1978 motion to withdraw its motion to dismiss filed in Eng BCA 2678 unless the 5 December 1978 hearing is postponed.

The Board allows Respondent's 17 November 1978 motion to withdraw its motion to dismiss filed in C&A 500 (except as it relates to claims H and I) unless the 5

December 1978 hearing is postponed.

Notwithstanding the above decisions the issues to be decided hereafter are those set out in the Board's 28 February 1975 order.

Appellant's "Motion to Stay and/or hold in Suspense Appellant's Motion of Nov. 18, 1978 for enlargement of Time, etc., Until Such Time as Respondent Reinstates its therein Referenced Motion" dated 22 Nov. 1978 is allowed.

Appellant's "Renewal of Appellant's Motion, dated Nov. 8, 1978, for enlargement of Time to Respond to Respondent's Motions to Dismiss and/or strike" dated 18 November 1978 is put in suspense in accordance with paragraph 4 above.

"Appellant's Partial Brief in Response to Board's Order of November 9,

1978, Regarding the Board's Alleged Order of June 22, 1978" is noted. The issues to be heard on 5 December 1978 are those established by the Board's 28 February 1975 order. Appellant's statements thereof appear in its Amended Complaints. Respondent's Answers, with the addition thereto of its Motion to Dismiss in C&A 500 as to claims H and I, set forth the Respondent's defenses.

The unexcused absense of a party at the pre-hearing conference or at the hearing on 5 December 1978 will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

Date: 29 November 1978

/s/ George S. Steele,
GEORGE S. STEELE, JR.

I concur:

/s/ John P. Jellico
JOHN P. JELLICO
Administrative Judge
Chairman

I concur:

/s/ E. K. McFadden
E. K. McFADDEN
Administrative Judge

Hon. George S. Steele, Jr:
Administrative Judge
Department of the Army
Office of the Chief
of Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants,
:Contract No.
:DA-49-080-Eng.-
:27. Dalecarlia
:Filters, Docket
No. C&A 500 Etc.
(and U.S. Court of Claims,
Action No. 2618.)

December 3, 1978

RE: SCHEDULED BOARD HEARING OF DECEMBER 5, 1978.

(Confirmation Western Union Night Letter of December 3, 1978)

It is with great regret that appellant finds it must advise that because of the

Board's denial of sufficient time to prepare its case, and of other good cause, all as of record, it cannot appear at December 5, 1978 hearing. Appellant's action is necessary as a direct consequence of continuing prejudicial developments stemming from respondent's improper tactics, which have precluded normal procedural due process for appellant. Thereby placing appellant's claims in great jeopardy. Account of other good cause follows. Appellants are hopeful that the Board will find its way clear to reschedule the hearing to March 1, 1979, or preferably thereafter.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Laykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr.
Administrative Judge
Department of the Army
Office of the Chief
of Engineers
Washington, D.C. 20314

Re: Appeals of
E. & E. J.
Pfotzer,
Appellants,
Contract No.
DA-49-080-Eng-27
Dalecarlia Fil-
ters, Docket No.
C&A 500 Etc.
(and U.S. Court of Claims
Action No. 2618.)

December 4, 1978

RE: SCHEDULED BOARD HEARING OF DECEMBER 5, 1978.

(Confirmation of Western Union Telegram of December 4, 1978.)

Pursuant to our telephone conversation of this morning. We respectfully protest possible Board action granting respondent permission to present its case without

our appearance on December 5, 1978. Also we do not waive a hearing, nor agree to submitting our case on the record. In addition we request that prior to further action in the matter you review our request as made in our telegram of December 1, 1978 for reconsideration of request for rescheduling of hearing date.

Respectfully submitted,

E. & E. J. PFOTZER

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr
Administrative Judge
Department of the Army
Office of the Chief
of Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants
:Contract No.
:DA-49-080-Eng-27
:Dalecarlia Fil-
:ters Docket No.
C&A 500 Etc.

(and U.S. Court of Claims,
Action No. 2618)

December 5, 1978

RE: SCHEDULED BOARD HEARING OF DECEMBER 5, 1978.

(Confirmation of Western Union Telegram of December 5, 1978; message also telephoned to Board byappellant at 8:15 a.m., December 5, 1978.)

Reference is first made to appellant's telegrams dated December 1 and 4 requesting the Board's reconsideration of its order of November 15, 1978; and second for rescheduling of date as requested for full scale hearing. Pertinently, it is considered that the Board's order dated

November 15, 1978, is against the preponderant weight of the evidence; such evidence establishing as a fact denial of due process in proceedings since June 20, 1978, by reason of enforced interference with appellant's case preparation.

Further, it is with deep regret that appellant advises, in event new date for full scale hearing is not allowed, that it appears appellant will thereafter have no alternative, but to petition the Court of Claims for a hearing of all its claims de novo, under pertinent provisions of the Wunderlich Act.

Supporting brief follows.

Respectfully submitted,

/s/ E. John Pfotzer
E. John Pfotzer
(E. & E. J. Pfotzer)

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

MAILGRAM SERVICE CENTER WESTERN UNION
MIDDLETOWN, VA. 22645 MAILGRAM

4-009184E340002 12/06/78 ICS IPMMTZZ
CSP WILA
1 3027645010 MGM TDMT WILMINGTON DE
12-06 0848A EST

E J PFOTZER
4 RIVERSIDE DR
WILMINGTON DE 19809

THIS MAILGRAM IS A CONFIRMATION COPY OF
THE FOLLOWING MESSAGE:

3027645010 MGM TDMT WILMINGTON DE 1 45
12-06 0848A EST
ZIP
GEORGE S STEELE JR, ADMINISTRATIVE JUDGE
DEPT OF THE ARMY
OFFICE CHIEF OF ENGINEERS
BOARD OF CONTRACT APPEALS
MRS FRANCES H ACATO RECORDER
1000 INDEPENDENCE AVE SOUTHWEST FORRESTAL
BLDG DAEN-CCB
WASHINGTON DC 20314

RE BOARD HEARING SCHEDULED FOR DECEMBER 5TH:

APPELLANT, AS IN THE PERTINENT RECORD, PROTEST APPARENT HEARING OF APPELLANTS CLAIMS AS UPON BASIS OF RESPONDENTS TESTIMONY ALONE, AND IN THE ABSENCE OF APPELLANT SUCH PROCEDURE IS CONSIDERED AS BEING IN VIOLATION OF DUE PROCESS, UNDER AND AS SUCH PREJUDICIAL TO APPELLANTS PROPER HEARING BEFORE THE BOARD, AND ALSO AS SUCH PREJUDICIAL TO APPELLANTS POSSIBLE HEARING BEFORE THE COURT OF CLAIMS. ALL THE FOREGOING AS SUPPORTED BY APPELLANTS TELEGRAM OF DECEMBER 5TH TO THE BOARD, AND OF PREVIOUS RELEVANT COMMUNICATIONS AS OF RECORD. FURTHER, APPELLANT MOVES OF ANY PROCEEDINGS AS OF YESTERDAY, OR TO BE HELD IN THE FUTURE IN THE NATURE OF A HEARING AS REFERRED TO ABOVE, BE DECLARED AS AGAINST DUE PROCESS, AND THE PERTINENT PROVISIONS OF THE WUNDERLICH ACT, AND SHOULD THEREFORE BE STRICKEN AS INVALID

E AND E J PFOTZER

0849 EST

MGMCOMP MGM

MAILGRAM SERVICE CENTER WESTERN UNION
MIDDLETOWN, VA 22645 MAILGRAM

4-027832E351002 12/17/78 ICS IPMMTZZ
CSP WILA
1 3027645010 MGM TDMT WILMINGTON DE
12-17 0904P EST

E J PFOTZER
4 RIVERSIDE DR
WILMINGTON DE 19809

THIS MAILGRAM IS A CONFIRMATION COPY OF
THE FOLLOWING MESSAGE:

3027645010 MGM TDMT WILMINGTON DE
380 12-17 0904P EST
ZIP
HONORABLE C MURRAY BERNHARDT, TRIAL JUDGE
UNITED STATES COURT OF CLAIMS
717 MADISON PL NORTHWEST
WASHINGTON DC 20005

I HEREBY ACKNOWLEDGE AND RESPOND TO YOUR LETTER OF NOVEMBER 16, 1978; AND SINCERELY APOLOGIZE FOR NOT HAVING HERETOFORE ANSWERED. PURSUANTLY, I WAS IN THE INTERIM INVOLVED IN A MOST DIFFICULT PROCEDURAL SITUATION, AND ONE OVER WHICH I HAD NO CONTROL. SUCH UNAVOIDABLY CULMINATING IN MY PROTRACTED DELAY IN RESPONDING TO YOUR LETTER; AND AS SOLELY STEMMING FROM A DAY TO DAY EXPECTATION THAT THE INVOLVED SITUATION MIGHT BE RESOLVED AMICABLY; AND YOU THEN SO ADVISED.

SPECIFICALLY, WITH RESPECT TO THE PRESENT

STATUS OF OUR CLAIMS BEFORE THE ENGINEERS BOARD OF CONTRACT APPEALS, I WOULD INI - TIALLY ADVISE THAT SINCE LEAVING YOUR COURT, A GREAT AMOUNT OF DIFFICULT, AND DETAILED PROCEDURAL WORK WAS DEMANDED OF, AND REQUIRED TO BE PERFORMED BY US, AND ALL OF WHICH WAS TIMELY ACCOMPLISHED, AS ON THE RECORD.

HOWEVER, OVER THE COURSE OF THE LAST FIVE MONTHS, AS ALSO ON THE RECORD, THE IN- VOLVED RESPONDENT HAS FAILED, IN FACT, UNTIL RECENTLY TO FILE ITS ANSWERS TO OUR AMENDED COMPLAINTS. THE LATTER DESPITE OUR REPEATED URGING, AS OF RECORD, BEFORE THE BOARD TO HAVE TIMELY DONE SO.

AS A CONSEQUENCE OF THE GREAT DELAY IN RESPONDENT'S FILING, AND DESPITE OUR SUB- SEQUENT NECESSARY REQUEST TO THE BOARD FOR A POSTPONEMENT OF DECEMBER 5 1978 SCHEDULED HEARING DATE (FOR ALL THE CLAIMS), TO COVER DELAYS NOT OF OUR MAK- ING, IN OUR CASE PREPARATION FOR TRIAL, AND TO THEREBY PERMIT US TO MEET RESPON- DENT'S DELAYED ANSWERS. THE BOARD DESPITE OUR TIMELY PROTEST, AND NECESSARY IMPOR- TUNITIES, NEVERTHELESS ADAMANTLY HELD THE SCHEDULED HEARING WITHOUT OUR PRESENCE.

PURSUANT TO THE SAID UNILATERAL HEARING, WE HAD TIMELY INFORMED RESPONDENT, AND THE BOARD, THAT WE COULD NOT ADEQUATELY COMPLETE OUR PREPARATION FOR THE HEARING, DUE TO RESPONDENT'S EXTENDED DELAY OF FIVE MONTHS, IN FILING ITS ANSWERS TO OUR AMENDED COMPLAINTS. OUR REPEATED AND TIMELY REQUESTS FOR RECONSIDERATION IN-

VOLVING A POSTPONEMENT OF THE DECEMBER 5 1978 HEARING IS PENDING BEFORE THE BOARD.

IN ACCORD WITH THE FOREGOING: WE ADVISE THAT AS SOON AS THIS MOST CRITICAL ASPECT OF THE SITUATION, WITH ITS HIGH UNCERTAINTY IS SETTLED, WE WILL BE IN A POSITION OF FULLY INFORMING YOU OF DEVELOPMENTS, AND OF THE STATUS OF THE SUBJECT MATTER, AND ALL AS PREDICATED ON PROGRESSIVE EXHIBITS OF RECORD.

(NB COPIES TO ALL INVOLVED PARTIES).

VERY TRULY YOURS

E JOHN PFOTZER
2109 EST
MGMCOMP MGM

TRIAL DIVISION

UNITED STATES COURT OF CLAIMS
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20005

November 16, 1979

Mr. E. John Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

Ray Goddard, Esquire
Department of Justice
Civil Division
Washington, D. C.

Re: Edmond Pfotzer, et al. v. The United States, Ct. Cl. No. 274-72

Gentlemen:

As near as I can make out from the complicated administrative history of this case, the next step is for plaintiffs to file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals. I shall await plaintiffs' submission accordingly.

Very truly yours,

/s/ C. Murray Bernhardt
C. MURRAY BERNHARDT
Trial Judge

Edmond and E. John Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

September 19, 1981

The Honorable C. Murray Bernhardt
Trial Judge United States Court of Claims
717 Madison Place, N.W.
Washington, D.C. 20005

Re: Edmond Pfotzer, et al. v.
United States,
Court of Claims No. 274-72

Dear Trial Judge Bernhardt:

This is to respectfully advise that plaintiffs, in the subject action and as pursuant to the Court of Claims' "ORDER" dated May 15, 1981 (Exhibit A - attached) dismissing plaintiffs' petition, contemplate filing their petition for writ of certiorari in the Supreme Court of the United States (Exhibit B - attached).

Pertinently, plaintiffs inform the court that plaintiffs' review of their claims set out in their subject action as filed July 5, 1972 in the United States Court of Claims shows that Claim No. 1 as appears on pages 7 to 11 inclusive (Exhibit C - attached) and Claim No. 10 as appears on pages 70 to 78 (Exhibit D - attached) and as referenced to

"PLAINTIFFS' DEMAND FOR JUDGMENT"

pages 79 and 80 (Exhibit E - attached) [69a] have not been litigated.

Apropos of the foregoing: the record shows that in accord with this court's "ORDER OF TRIAL JUDGE STAYING PROCEEDINGS" filed December 7, 1973 (Exhibit F - attached) the Board of Contract Appeals ostensibly reconsidered appellants' unidentified appeal for reconsideration of the Board's basic adverse ruling of December 5, 1978 (pages 4 and 5 of Exhibit G) and on page 35 thereof the Board listed under its "Recapitulation", various claims and decisions as had been decided by the Board.

As pertinent to the listing as shown on page 35 of Exhibit G, it is clear that neither Claim No. 1 supra nor Claim No. 10 was heard and decided by the

Engineers Board of Contract Appeals and that these two claims are presently pending in the Court of Claims and such are prospectively to be amended to include claims for denial to plaintiffs of their right to procedural due process under applicable amendments to the United States Constitution.

In consideration of the foregoing: the question perplexing us is: whether until all our claims before the Court of Claims have been heard may we properly proceed to the Supreme Court of the United States upon a portion of our claims originally before the Court of Claims, without jeopardizing Claim No. 1 and Claim No. 10 as pending before the Court and prospective amendments thereto.

The problem stated next above arises

because following the Court of Claims' "dismissal of our petition", covering only a part of our claims before the Court, such dismissal, if it is to be appealed, must be followed by petition for a writ of certiorari within the allotted period, otherwise such right will be lost. Involved in the problem supra is the implication, or even the legal requirement incident to comparable appeals, that a petition to the Supreme Court for a writ should cover the full disposition of the entire action. In our case the latter aspect does not appear - and made so by the court's related remand and its subsequent disposition etc. (see Exhibit F and Exhibit H). Accordingly, there is todate an absence of final judgment dispositive of all of plaintiffs' claims

originally filed in this court.

Pursuant to the foregoing problem: our review of the law has not revealed a clear-cut answer. Specifically as to whether we must await this court's final decision on all pending claims originally filed before we may proceed to seek a writ of certiorari in the Supreme Court of the United States as involving the specific dismissal of our petition as covering a part of the claims as are referred to in Exhibit A and Exhibit B supra.

Presently we are not requesting legal advice as such: but we are in urgent need of your judicial enlightenment upon what appears to be a most infrequent problem, as stated supra, but one which probably has heretofore occasionally

developed before your court. However, we have been unable to find a ruling on point. Accordingly, we are obliged to request you endeavor to answer the following specific questions:

(1) To your knowledge, are we required to await the decisions of remaining Claim No. 1 and Claim No. 10 (Exhibits C and D) plus prospective amendments, to our original petition in the Court of Claims; and if ultimately required a possible petition for writ of certiorari pertinent to them in the Supreme Court; or

(2) May we presently seek a writ of certiorari in the Supreme Court as related to the claims involved in Exhibit A and Exhibit H without correlatively foreclosing ourselves from potentially filing a petition for writ of certiorari in the

Supreme Court of the United States as relating to the pending Claim No. 1 and Claim No. 10 etc. supra in the Court of Claims.

Please let us hear from you at your earliest convenience. Thank you.

Very truly yours,

/s/ E. John Pfotzer
E. John Pfotzer

cc: Ray Goddard, Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
Washington, D. C.

FRANK T. PEARTREE
CLERK

OFFICE OF THE CLERK
UNITED STATES COURT OF CLAIMS
717 MADISON PLACE, N. W.
WASHINGTON, D.C. 20005

September 24, 1981

Mr. E. John Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

In re: Edmond Pfotzer, et al.
v. The United States
No. 274-72

Dear Mr. Pfotzer:

I return herewith the enclosures received under cover of your letter of September 19, 1981, addressed to Trial Judge Bernhardt.

The court's order of February 6, 1981, dismissed the petition en toto in the above-entitled case. The case is no longer a pending one before this court.

Sincerely yours,

/s/ Frank T. Peartree

Clerk

Enclosures

APPENDIX-TABLE OF CONTENT

RE: PLAINTIFFS' MOTION FOR THE COURT'S ORDER VACATING ETC. ITS JUDGMENTS OF FEBRUARY 6, 1981 AND MAY 15, 1981

APPENDIX

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11. Pertinent excerpts from transcript of pre-trial hearing of April 8, 1978 before Corps of Engineers Board of Contract Appeals; and as referenced to "PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT" as filed on October 17, 1980.....47 to 52

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Hon. Horace C. Reosti :Re: Appeals of E.
Administrative Judge :& E.J. Pfotzer
Department of the Army:Appellants, Con
Office of the Chief :tract No. DA-49-
of Engineers :080-Eng-27, Dale
Washington, D.C. 20314:carlia Filters,
:Docket No. C&A
:500 Etc.
(and U.S. Court of Claims
Action No. 2618
June 20, 1978

RE: RESPONDENT'S DELAYED RESPONSE TO APPELLANT'S COMPLAINTS

The Board's consideration is herein respectfully requested to appellant's letters addressed to the Board, with copy thereof to respondent Government trial attorney, under date of March 18, 1978 and

April 4, 1978 (copies attached). These letters cover transmittal therewith of eleven amended formal complaints in the subject action, each set forth in comprehensive substance, and detail. All such claims are as presently before the Board for its processing under applicable provisions of specific Board rules set forth on page one, paragraphs (b), (c), (d) and (e), copies thereof attached; and also as conforming to understanding reached by the parties and the Board at pre-hearing conference under date of April 8, 1975, and as supplemented by follow-up conference of August 17, 1977.

In connection with the foregoing appellants advise that to the present date it has received no response to any of these complaints from respondent, as here-

in referenced rules intend should have been timely forthcoming, as thereby in conformity with the basic rules premise, "x x x to secure a just and inexpensive determination of appeals without unnecessary delay."

As consonant with the above representations appellants protest the evident disregard of the basic rules procedure in respondent not having timely answered the subject complaints thereby negating appellants most substantial forward efforts, and such disregard most seriously prejudicial to appellants proper interests in orderly and expeditious pre-hearing proceedings, and as thereby unduly adding greatly to the expense of the proceedings, as well as to the time required for the hearings.

By reason of the above considerations appellants request they be promptly informed as to the approximate dates upon which respondent may be expected to forward its responses, in order that appellant may thereafter timely adjust its hearing preparations consistent therewith. Further, it would be most helpful for the subject responses be forwarded appellants singly as completed rather than the entire group combined.

Respectfully submitted,
E. & E. J. Pfotzer
Appellants pro se

/s/ E. John Pfotzer
E. John Pfotzer

cc: Della K. McKnew, Esq.
District Counsel

Howard A. Pollack, Esq.
Government Trial Attorney

DAEN-CCB 22 June 1978

Howard A. Pollack, Esq.
Government Trial Attorney
U.S. Army Engineer District, Baltimore
Baltimore, Maryland 21203

Re: Appeals of E. & E. J. Pfotzer
Docket Nos. Eng C&A 500 etc.

Dear Mr. Pollack:

Reference is made to correspondence dated June 20, 1978 from appellant concerning the government's response to appellant's complaints. Unless answers to the amended complaints are received within 30 days the Board will enter a general denial on behalf of the government in accordance with Rule 6b of the Board's Rules.

Sincerely yours,

HORACE C. REOSTI
Administrative Judge
Member of the Board

Copies furnished:
Mr. E. J. Pfotzer
DE North Atlantic Division
Gary W. Hudiburgh, Esq.,
DAEN-CCF OCE

APPEAL OF MORGAN CONSTRUCTION COMPANY

IBCA—253 *Decided September 20, 1960*

Contracts: Appeals

Contractor-appellant has a contractual right to "be afforded an opportunity to be heard and to offer evidence in support of its appeal." This right must be honored even if amount of claim involved is small. Parties may stipulate to submit appeal "on the record."

BOARD OF CONTRACT APPEALS

Department Counsel has moved on September 9, 1960, that the Board should

dismiss Claim No. 2 of the Contractor, and permit sworn statements to be supplied the Board by both parties in lieu of conducting a formal hearing in this case on Claims Nos. 1 and 3, following a statement of *factual issues* by the contractor and accompanied by a supplement to this statement when such information is supplied by the contractor.

Appellant's appeal dated July 22, 1960, sets forth three reasons why the Findings of Fact and Decision of the contracting officer of June 16, 1960, should be deemed to be erroneous. These reasons are, in summary, as follows:

1. frost conditions which existed prior to January 6, 1960 which "were beyond the control of the contractor and which caused a delay in the work."
2. "unnecessary supervision."
3. failure of the contracting officer to consider the effects of a cancelled, "premature" resumption of work order.

These are all factual issues regarding which the contractor-appellant has a contractural right to "be afforded an opportunity to be heard and to offer evidence in support of its appeal." [1] As appellant has specifically requested a hearing, and as his claims seemingly fall into the category of disputes "concerning a question of fact," the motion to dismiss Claim No. 2 is denied.

It is noted in connection with this denial that proceedings before the Board on appeals are *de novo*.[2] Further, should it appear during the proceedings that the contracting officer has not passed in a decision on a particular fact, then the matter will be remanded to the contracting officer.[3]

Department Counsel also alleges that the amount in dispute is $1,400 and that the

[3] *Cf. James Lumber Company*, ASBCA No. 1991 (March 31, 1954).

[4] *Utah Construction Company*, IBCA-133, 140, 67 I.D. 248, 256 (1960); *Francis O. Day Company, Inc.*, IBCA-178 (December 4, 1959); *General Excavating Company*, IBCA-150 (May 25, 1959); *Economy Pumps, Inc., Division of C. H. Wheeler Manufacturing Company*, IBCA-94 (February 13, 1957).

Government would prefer in view of the small amount involved to have submitted sworn statements on behalf of the Government and appellant, respectively, thus avoiding the cost both to the Government and appellant of a formal hearing. The Government does not make this recommendation in any spirit of denying the contractor a full opportunity to present his case but rather makes it for the reason that expense to both parties can be minimized by this procedure. * * *

This course of action seems to be desirable, indeed. However, the Board has no power to compel the appellant to follow this course of action as it has a contractual right to a hearing, regardless of the amount of the claim involved. Hence, the Board denies the motion in so far as it concerns further procedures concerning Claims Nos. 1 and 3.

However, nothing prevents Department Counsel from obtaining approval of the appellant or his attorney to the course of action, which he proposes.

A copy of the statement of the Government's position, including Department Counsel's arguments on this point, has been served on the appellant. Hence, in view of the small claim involved and the expenses connected with the holding of a hearing, the Department Counsel should contact appellant, or his attorney, with a view to negotiate, if possible, a stipulation to the effect that the matter may be considered by the Board solely on the record. However, during the negotiations, it should be made clear to the appellant that full opportunity will be given to him to present his case on the record by means of written statements and affidavits, if he so desires. No formal appearance has been noted as to appellant's counsel, mentioned in the Statement of Government's Position, as being Martin J. Andrews, Esq., Denver, Colorado, and as having participated in proceedings before the contracting officer.

If appellant is not represented by counsel, Department Counsel should offer to assist the appellant in the solution of problems connected with procedures involved in the submission of statements and affidavits "on the record" not "because of any legal requirement to do so, but as a matter of sound administrative policy."[4] It is the opinion of the Board that such assistance in procedural matters is not violative of the statute prohibiting assistance by a Government employee in the prosecution or support of a claim against the United States "*otherwise than in the proper discharge of his official duties* * * *." (Emphasis added.)

PAUL H. GANTT, *Chairman.*
THOMAS M. DURSTON, *Member.*
JOHN J. HYNES, *Member.*

UNITED STATES v. J. HUBERT SMITH

A-28387 *Decided August 1, 1960*

Mining Claims: Contests—Rules of Practice: Government Contests—Regulations: Waiver

Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. Hubert Smith has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated February 2, 1960, which affirmed a decision of the manager of the Denver, Colorado, land office, dated May 29, 1959, declaring his lode mining claim, The Blue Sky Lode Mining Claim, to be null and void for the reason that an answer to the complaint against the claim was not timely filed.

The facts are that a complaint was served on the appellant on March 4, 1959, in a contest which was initiated by the United States Forest Service of the Department of Agriculture. The complaint alleged that no discovery of valuable deposits of mineral had been made within the limits of the claim and that the lands comprising the claim are nonmineral in character.

The rules of practice of the Department governing private contests provide that a contestee "must" file an answer within 30 days

[1] *Cf. The Eagle Constr. Corp.*, IBCA-230 (July 18, 1960); *Truax Mach. & Tool Co.*, IBCA-195, 59-2 BCA par. 2280, 1 C.C. par. 563 (1959); *C. H. Wheeler Mfg. Co.*, IBCA-127, 66 I.D. 382, 58-2 BCA par. 1905 (1958); *Zinsco Elec. Products*, IBCA-104, 57-1 BCA par. 1260 (1957); *Carl W. Pistor*, IBCA-81, 56-2 BCA par. 1125 (1956); *Schmitt Steel Co.*, IBCA-29, 6 CCF par. 61,719 (1955); *The Pelton Water Wheel Co.*, IBCA-16, 62 I.D. 385, 6 CCF par. 61,705 (1955). *Accord*, 39 Comp. Gen. 343, 348 (1959). In that decision the Comptroller General states that "clause 5(c) of Standard Form 23A should be construed as evidencing an intention to hold the contractor responsible for delays of subcontractors or suppliers unless the delays were due to causes which could not have been foreseen by either the contractor or the subcontractor or supplier."

after service of a complaint upon him and that if an answer is not filed as required "the allegations of the complaint will be taken as admitted by the contestee" and the case decided without a hearing. 43 CFR, 1959 Supp., 221.64, 221.65. Another rule provides that proceedings in Government contests "shall be governed" by the rules relating to private contests, with exceptions not material here. 43 CFR, 1959 Supp., 221.68.

Thus, the appellant was required to file an answer to the complaint within 30 days after March 4, 1959. The appellant's answer was not filed until April 16, 1959, thirteen days late, although the complaint served on him expressly warned him that if he did not file an answer within 30 days the complaint would be taken as admitted and the case decided without a hearing. A copy of the rules of practice was attached to the complaint.

In his appeal the appellant states that he employed an attorney in Alamosa, Colorado, to answer the complaint, whereas he resides in Manassa, Colorado; that although the answer was prepared, the appellant was not in Alamosa until April 15, 1959, at which time the answer was mailed; and that failure to file the answer was due to inadvertence and oversight on the part of his attorney.

In a recent decision, *Earl D. Deater* v. *John C. Slagle*, A-28121 (May 24, 1960), the Department held that under the rules of practice where an answer to a complaint in a private contest is filed one day late the allegations of the complaint must be taken as admitted by the contestee and the case decided without a hearing, and that the Secretary is without authority to waive the rules to permit the late filing of the answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955); *Chapman* v. *Sheridan-Wyoming Coal Company*, 338 U.S. 621 (1950).

Under the rule announced in the *Slagle* case, the appellant's mining claim was properly declared to be null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

By: EDMUND T. FRITZ,
Deputy Solicitor.

(Paragraph 2692) Cited 60-2BCA

FLORA CONSTRUCTION COMPANY

IBCA No. 180, Interior Appeals Panel, June 1, 1960. Contract No. 14-06-100-1111.

Pertinent excerpts from the foregoing are included infra.

Contractor's Right to Hearing

Despite the long delays in the prosecution of this claim, the Board granted the contractor's request for a hearing and requested that the parties submit to the Board within thirty days statements proposing the place and time of the hearing. In denying the Government's proposal that the Board determine the appeal on the basis of the record before it because of the length of time that had elapsed and the contemplated difficulty of producing witnesses, the Board noted that the reasons for the delay were not wholly the fault of the contractor, and its contractual right to a hearing could not be defeated by the circumstances noted by the Government.

And further, from page 13,591:

It is the opinion of the Board that the contractual right of an appellant to a hearing cannot be defeated by the circumstances mentioned in the letter of April 22, 1960, and has not been lost by reason of the failure to submit a

request for a hearing during the period of approximately a year that elapsed between submission of the statement of the Government's position and the first indication that a hearing was desired. While the appellant's inaction in this respect would have justified the Board in deciding the appeal on the record during the interim, lack of manpower has prevented it from attempting to do so.

In view of these facts, the request for a hearing seems timely and must be honored if a factual dispute exists between the parties, as it does in the instant case.

Hence, the Board enters the following

Order

The request of appellant to hold a hearing is granted. The parties are requested to submit to the Board, within 30 days after the receipt of this order, statements proposing the place and time of the hearing.